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ABSTRACT

As popular support grows for improving education, the states are considering many different ways to attract better teachers into teaching and keep good teachers in the schools. Proposed reforms are being widely discussed, in national reports, state legislatures, and many other forums across the nation. Less widely discussed but also important are the legal context for reform and the legal implications for particular types of reform. This paper identifies central legal principles that should shape state action in three areas: the entry of new teachers into the profession, the performance of teachers, and the dismissal of teachers. (JD)

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# AN OVERVIEW OF LEGAL ISSUES IN TEACHER QUALITY

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# AN OVERVIEW OF LEGAL ISSUES IN TEACHER QUALITY

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CONTENTS


INTRODUCTION ..... 1

1. ENTRY ..... 2
   - Certification of Teachers ..... 2
   - Accreditation of Teacher Education Programs ..... 3
   - Testing Teachers ..... 3
     - The Programs ..... 3
     - Constitutionality of Testing ..... 4
     - Adequate Notice ..... 4
     - Test Validity ..... 5
     - Bias ..... 5
     - Developing A Testing Program ..... 6
     - Handicapped Teachers ..... 7

2. PERFORMANCE ..... 9
   - Tenure Laws ..... 9
   - Teacher Evaluation ..... 10
   - Changing Employment Requirements ..... 12
     - Changes in Tenure ..... 12
     - Changes in Certification ..... 13
     - Other Changes ..... 14
   - Collective Bargaining ..... 15
     - Scope of Bargainable Issues ..... 15
     - Union Duty of Fair Representation ..... 16
   - Equity Considerations ..... 17
   - The Interrelationship of Tenure and Labor Laws ..... 18

3. DISMISSAL ..... 20
   - Incompetence ..... 20
   - Reductions in Force ..... 22
   - Legal Limits to Academic Freedom ..... 23
   - Procedural Requirements ..... 24

4. CONCLUSION ..... 26

APPENDIX
STATE REQUIREMENTS FOR TESTING FOR TEACHER CERTIFICATION ..... 27

NOTES ..... 28

SUGGESTED READING ..... 37

## INTRODUCTION

As popular support grows for improving education, the states are considering many different ways to attract better teachers into teaching and keep good teachers in the schools. Proposed reforms are being widely discussed, in national reports, state legislatures and many other forums across the nation. Less widely discussed but also important are the legal context for reform and the legal implications for particular types of reform.[1] This paper identifies central legal principles that should shape state action in three areas: the entry of new teachers into the profession, the performance of teachers and the dismissal of teachers.

This overview of legal principles is intended to clarify the options open to policy makers and help them avoid legal pitfalls. As long as the legal issues discussed below are considered in the policy-making process, "the law" need not obstruct education improvement. Teacher quality can be raised and accountability achieved while preserving the rights of individual teachers.

## 1. ENTRY

The first step to excellence in teaching is to improve the qualifications of those who enter the profession. Every state is considering how to strengthen professional screening requirements. Strategies include raising admission standards for teacher education programs, tightening the process of institutional accreditation, increasing certification requirements, imposing continuing education and testing requirements for recertification, providing financial incentives for teachers in certain subject areas and certain locales, and reforming the education of teachers.

### Certification of Teachers

Every state has enacted statutory eligibility requirements for teaching in public schools.[2] Certification requirements are lenient in some states, strict in others. Most states require prospective teachers to have completed postsecondary courses or programs; many require that candidates have a certain grade point average, or complete a period of student teaching, or both. About a third of the states require prospective teachers to pass a competency test.[3] Although many requirements are already in place and although most teacher colleges have raised admission standards and toughened curricula in the past five years,[4] many states are now considering further ways to raise the quality of beginning teachers.[5]

What are the legal parameters of state efforts to tighten entry into the teaching profession? A state legislature is free to expand or restrict statutory requirements for teacher certification, subject only to constitutional mandates. With one exception, every state constitution contains an education clause that requires the maintenance of a public school system; only Mississippi makes this discretionary.[6] The education clause generally assigns responsibility for the system to the state legislature, and providing qualified teachers is generally seen as basic to carrying out this responsibility. There is, however, some legal question about whether a state board of education, rather than a legislature, may promulgate certification requirements. The scope of a state board's authority depends on the state's statutes and constitution.[7] In some states (e.g., California) an independent commission is responsible for teacher certification.[8] If the constitution and statutes are inconsistent, the constitution prevails.

Certifying teachers is a licensing process, which will generally be legitimate as long as the process is reasonably related to the state interest in education quality. Virtually all the screening

strategies listed above appear to be related to the state goal of assuring that teachers are adequately qualified, but states should be prepared to demonstrate the relevance of each strategy.

## Accreditation of Teacher Education Programs

States have the legal authority to accredit teacher education programs. Accreditation is a relatively straightforward matter that does not raise many legal considerations. (The main potential issue is the scope of the regulatory authority of state agencies, since state constitutions may restrict the extent to which regulatory power may be delegated.) In general, however, states are free to introduce more rigorous standards for accreditation. For instance, several years ago Florida enacted a requirement for continued approval of teacher education programs within the state, with approval contingent on passage of the state teacher test by at least 80% of program graduates.[9] This year Florida used the sanction of decertification for the first time, decertifying 38 teacher training programs at 18 different Florida institutions because too many program graduates failed the teacher test.[10]

## Testing Teachers

Testing teachers has been perhaps the most controversial screening strategy and consequently the most litigated. The following analysis of legal issues posed by this approach is offered as a sort of case study that may be useful for policy makers who wish to analyze other screening approaches as well; most of the principles discussed would govern other strategies for raising the quality of the teaching work force.

Analyzed below is testing for initial certification. Testing teachers who are already certified raises additional constitutional issues of retroactivity that are discussed later in the paper. Also discussed later is testing teachers as a condition for continued employment.

### The Programs

Twenty states now require that teachers pass a competency test to be certified. (The appendix lists those states.) Some states use the National Teacher Examination (NTE) developed by the Educational Testing Service; others prepare their own tests. Some states test so-called "basic skills"; others test comprehensive knowledge and professional competence. Most of the 20 states test students at the end of their training, although a few test freshmen entering teacher education programs. Although these

tests cannot measure classroom teaching ability, they do screen for baseline skills. Classroom performance can then be evaluated against other standards.

## Constitutionality of Testing

Courts have shown a long-standing reluctance to interfere with academic decision making. The courts are not receptive to challenges to education policy making, and they defer to educators' academic judgments except when specific constitutional rights of individual teachers are jeopardized. Even the U.S. Supreme Court has warned against judicial intrusion into education since "[c]ourts are particularly ill-equipped to evaluate academic performance."[11] The Court explained that, for constitutional purposes, academic decisions differ from disciplinary decisions, which require a hearing because they resemble traditional judicial and administrative fact-finding proceedings.

This judicial context governs litigation over academic decisions in general, and challenges to tightened requirements for teacher certification, such as testing, in particular. A state acts reasonably on behalf of the public interest in taking steps to preserve the integrity of its education process. Teacher testing for certification has been upheld as being rationally based on the state's desire to assure qualified teachers. In the leading case, a federal court in 1977 upheld South Carolina's use of testing for teacher certification, saying that the "state has the right to adopt academic requirements and to use written achievement tests designed and validated to disclose the minimum amount of knowledge necessary to effective teaching."[12]

There is no doubt that the Supreme Court, too, would find validated testing rationally related to a state's interest in the quality of the teaching system. Although it has never ruled on teacher testing, the Court in 1976 upheld the constitutionality of a police employment test: "It is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing."[13]

## Adequate Notice

The right to notice derives from the due process clause of the fourteenth amendment to the Constitution. It has been clarified in student competency testing litigation, although courts have not yet addressed it in the context of testing teachers.[14] Like students, teachers must have fair warning of competency tests, and they must be given the opportunity to prepare for changed certification requirements. Thus, a state wishing to test

teachers for certification is legally required to provide a phase-in period. The testing program and the type of material the test will cover must be announced before certification sanctions take effect. Although exactly how much time must be allowed is unclear, at least one year would be a legal minimum.

Teachers should be given more than one opportunity to pass a competency test. This is another requirement for fairness that also derives from student competency testing litigation. Multiple opportunities should be offered to avoid the appearance of arbitrary action. It is also advisable to build remediation opportunities into the testing system, since courts in student testing cases have implied that testing would otherwise be unconstitutional.[15]

## Test Validity

To avoid being arbitrary or capricious, tests must actually measure what they purport to measure and there must be a demonstrable connection between a test and the purpose for which it was designed. Courts tend to refer to these ideas of a match between a test and its purpose as "content validity," although psychometricians will distinguish at least three kinds of content validity.[16] Although content validity has surfaced as an issue in the context of "racially disparate" test results, courts probably would mandate content validity in other circumstances as well, but there is no such precedent thus far. If an employment test is not shown to be related to the job, its classification of passers and failers would lack a rational relationship to any legitimate state goal, and the test would probably be unconstitutional under minimal equal protection requirements, as well as substantive due process.[17]

## Bias

Tests may not be racially, culturally or sexually biased. If a test question presupposes knowledge generally unavailable to one racial or cultural group, that question is biased, and test validity may be impaired by extraneous factors. If, for example, a test of a teacher's reading comprehension included questions about golf course etiquette, answers would be biased by the cultural background of the respondent. The validation process must insure that specific items on new test instruments are free of bias.

Most challenges of testing programs have concerned their impact on special populations. When tests have produced discriminatory results, claims have been brought on the basis of the Constitution or of various federal statutes. Under the Constitution, a test may be legal even though it has a disparate impact on one racial group, as long as there was no discriminatory intent.[18] But

claims of discrimination based on statutes may not require proof of intent. Under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment practices, the rules are complex. A prima facie case of test discrimination exists if statistics show a racially or sexually disparate impact in the pass rate. Unless test administrators can rebut that statistical presumption of discrimination by showing that the disparity results from legitimate job-related selection procedures, the testing program will be illegal.[19]

What is "disparate impact"? The federal Equal Employment Opportunity Commission (EEOC) has adopted guidelines that say a selection rate for any racial group of less than 80% of the rate for the group with the highest rate is evidence of disparate impact. Thus, if a state test produces a racially disparate pass rate, the state education agency must be prepared to show how the test was job-related -- or, to paraphrase a court -- that the test accurately selects applicants who would be better teachers.[20]

The two main challenges to using testing for initial teacher certification provide lessons for other states. Although both cases involved the National Teacher Examination (NTE), the same principles would apply to other tests. In the first case, in North Carolina, the court struck down the testing program because no validation study had been done. Expressly noting that a properly validated testing program would be legal, the court criticized North Carolina for failing to validate its cutoff score. Consequently, the test was an arbitrary denial of equal protection of the law: there had been no "validation with respect to teacher competency . . . that a score of 949 truly means that one does not possess enough knowledge to teach adequately."[21] Such a failure to validate would be illegal under Title VII, when racially disparate pass rates are shown. Another federal court upheld the teacher testing program of South Carolina, despite its racially disparate impact. The court found the test rationally related to the state interest in assuring minimally competent teachers. The court rejected a Title VII challenge to the testing and accepted the state's validation study, which related the test to the content of teacher training courses rather than to job requirements.[22]

## Developing A Testing Program

It has subsequently become clear that tests should be validated against job requirements as well as against training programs. Two Justices dissented from the Supreme Court's summary affirmation of South Carolina's testing program. These Justices questioned whether the lower court was "correct in holding that the NTE need not be validated against job performance and the validation requirement was satisfied by a study which demonstrated only that a trained person could pass the test."[23] Lower court decisions, in other types of testing cases subsequent to the South

Carolina decision, suggest that validation to training courses rather than to job performance would be legally inadequate.[24]

For policy reasons, as well as for legal reasons, the job performance approach to validation seems preferable, especially since many educators have questioned whether training bears much relationship to actual classroom teaching. States might improve education more directly by measuring the skills needed for effective teaching rather than by testing whether a candidate has received effective training.

Deliberate and comprehensive test development is vital to the legality of a testing program, and the development process should be systematically documented. A federal appeals court has suggested five measures of the content validity in any employment testing program:

- The test makers must have conducted a suitable job analysis.
- The test makers must have shown reasonable competence, thoroughness and care in constructing the test itself.
- The content of the test must relate to the content of the job.
- The content of the test must be representative of the content of the job.
- The system for scoring the test must usefully select applicants who can better perform the job.[25]

The participation of professional test developers is essential to assure the psychometric validity of a test, as well as to convince a court of its legality. One court, in a case concerning a test for hiring police officers, has gone so far as to warn employers to use outside experts to help develop tests: "an employer dispenses with expert assistance at his peril."[26] In other words, a court will scrutinize the validity of a staff-developed test more closely than the validity of a test developed with expert assistance.

Although the participation or cooperation of teachers in test development is not yet a legal issue, ultimately teacher participation in testing may raise labor law issues concerning the scope of collective bargaining.[27]

## Handicapped Teachers

Testing programs must not discriminate against handicapped teachers. Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits discrimination in all federally funded programs or activities against a qualified person on the basis of handicap, requires reasonable modifications in test administration

to insure that handicapped applicants are fairly tested for mastery of test materials. Modifications might include time extensions, for instance, or printing the tests in Braille. Section 504 does not require educators to lower academic standards to accommodate persons who are not "otherwise qualified" and cannot meet valid standards because of their handicaps.[28]



8

## 2. PERFORMANCE

Once teachers are employed in the school system, how can excellence be rewarded and incompetence be eliminated? To raise the quality of teachers, states are considering not only incentive plans like merit pay and career ladders but also performance evaluation plans and other changes in tenure systems. A few states are even considering the abolition of tenure. This section discusses legal considerations raised by tenure and by various other strategies to keep better teachers in public schools.

Performance evaluation issues are central to merit pay plans and career ladders as well as to improving traditional tenure systems. Merit pay plans tie teachers' salaries to measures of performance: teachers whose performance is deemed excellent receive higher salaries. Some plans may, however, be more accurately characterized as negative merit pay: all teachers get the same salaries except teachers receiving bad evaluations who get lower salaries. Career ladders restructure teacher employment, giving promotions from rung to rung and salary increases to teachers who assume greater responsibilities. Career ladders introduce the concept of academic rank to teaching in elementary and secondary schools.

Since the purpose of both reforms is to reward excellence by providing financial incentives, criteria for excellence must be established. Legal problems will arise with vague or poorly defined standards for evaluation. Legitimate standards are also just as important to the dismissal of incompetent teachers as they are to the promotion of competent teachers.

### Tenure Laws

Teacher performance under tenure systems has recently become the focus of critical scrutiny as well as the source of substantial confusion. Every state has a statutory system that provides for the continued employment of elementary and secondary public school teachers unless they are dismissed for cause. These state systems vary in procedural details and terminology. Some statutes do not use the term "tenure," for example, but speak of "permanent employees." The Arkansas statute, for instance, states that it "is not a teacher tenure law in that it does not confer lifetime appointment, nor prevent discharge of teachers for any cause which is not arbitrary, capricious, or discriminatory."[29] Not surprisingly, then, the statutes vary greatly in how much job protection they provide.

The first tenure law was enacted about 75 years ago in New Jersey. At that time job protection was seen as necessary because of

prevalent nepotism, political favoritism and arbitrary dismissals. Granting teachers "tenure" means that they can be dismissed only for cause, as specified in state statutes.

Granting tenure is a much simpler legal matter than dismissing tenured teachers. Teachers must generally complete a specified period of probationary employment (usually three years). Then, as long as a teacher has not been given notice of nonrenewal, he or she receives tenure. In some states, schools must take certain actions for a teacher to become tenured, following procedures specified by state statute. In general, schools have great latitude in deciding whether to grant tenure, as long as decisions are not discriminatory. Tenure decisions also must not be based on teachers' exercise of academic freedom, which is discussed below in the context of teacher dismissal.

Some tenure statutes do not address performance evaluation at all and others mandate only administrative regulations. But several states mandate evaluation criteria in substantial detail and make evaluation an integral part of the tenure system.[30] When a teacher's performance is judged unsatisfactory, the teacher is given an opportunity to demonstrate improvement.

Performance evaluation is not incompatible with the tenure system, although tenure laws have been weak in this respect and there is a widespread perception that tenured teachers are not subject to sufficiently critical evaluation. Since tenure is a product of legislation, there is no legal obstacle preventing states from strengthening the evaluation component of tenure.[31] Tenured status need not insulate teachers from performance evaluation. Tenure does not require continuing the employment of an incompetent teacher; all tenure laws provide for dismissal of incompetent teachers.

## Teacher Evaluation

The legality of most current reform proposals depends on the establishment of objective criteria for evaluating teachers and of an even-handed process for conducting evaluations. Merit pay plans have been tried before, but they have usually been dropped because problems with fairness of administration led to staff dissension and low morale.[32] Often, the time and care required to develop an adequate plan have discouraged schools from trying merit pay.

It would not be legally sound to implement any kind of incentive plan without first developing standards and procedures: "there must be a specified set of skills, knowledge, abilities, and attitudes that teachers are expected to demonstrate at each level on the ladder."[33] Any kind of merit pay or career ladder for teachers would be illegal if advancement decisions were based on an arbitrary or subjective evaluation process. To some extent,

evaluating teachers is inherently difficult, since (as has been traditionally argued) teaching is so subjective a process. Yet research in the past decade has begun to identify the components of effective schools and effective teaching.[34]

As long as the criteria used to classify teachers are rationally related to state objectives, the criteria will be constitutional. The "rational basis" test that governs most education decisions is relatively easy to satisfy. However, the criteria for evaluation must be made explicit for a plan to be legally defensible.

Some tenure statutes already enumerate minimum evaluation criteria. Washington's statute, for instance, lists the following categories:

- Instructional skill
- Classroom management, professional preparation and scholarship
- Effort toward improvement when needed
- Handling of student discipline and attendant problems
- Interest in teaching pupils and knowledge of subject matter.[35]

But evaluation criteria need not be spelled out by statute, and specifying criteria in administrative regulations could provide greater flexibility. Above all, evaluation criteria need to be usable; there would be disadvantages to making the criteria too specific or too rigid to work.

A major question about merit pay and career ladder plans is: who does the evaluation? Teachers' unions have generally objected to these kinds of plans because they fear evaluation will be arbitrary and subjective. When a plan allows teachers to evaluate other teachers, fewer problems are likely. Although the involvement of teachers in the evaluation process is largely a policy matter, the extent of that involvement does have labor law implications: state collective bargaining laws address the respective roles of teachers and school boards in determining education policy and working conditions. (Also as a matter of policy, teachers should be involved in developing evaluation laws, since their opposition may kill a plan. When Governor Alexander of Tennessee proposed a master teacher plan, teachers objected that they had not been consulted; the legislature did not accept the governor's plan in 1983.[36])

Conventional evaluation of teaching, as reflected in tenure laws, has emphasized process and teacher input. A merit pay approach places more emphasis on results, on so-called "productivity." The idea behind "productivity evaluation" is to evaluate the results

of teaching, i.e., students' learning.[37] One particularly controversial idea is to use student performance on tests as a quantifiable measure of teacher productivity.[38] One federal appellate court upheld the non renewal of a nontenured teacher's contract on the basis of her students' low performance on tests, finding this neither arbitrary nor capricious.[39]

Despite that one court decision, basing teacher evaluation solely on student performance would be legally unsound, because of the obvious potential for inequities: students have widely different abilities from class to class.[40] It seems unlikely that a system could be devised that would assure the fairness of teacher evaluation based strictly on student test performance.[41]

## Changing Employment Requirements

Schools and state legislatures retain the authority to change requirements for teacher tenure and certification. Courts do not look kindly on teachers' claims of breach of contract based on changes in tenure laws. However, the contractual and constitutional rights of employed teachers must not be impaired by reforms that toughen tenure standards or give special attention to certain kinds of teachers (e.g., science teachers).

Courts recognize that educational institutions have "wide latitude and discretion" in determining academic requirements.[42] Latitude to make changes is limited, however, by constitutional requirements, including due process and the contract clause. Ample notice of changed requirements and an opportunity to satisfy new requirements must be provided to satisfy procedural rules of due process.

### Changes in Tenure

Teachers have claimed that legislation repealing or modifying tenure unconstitutionally impaired their indefinite statutory contracts. In general, courts disagree: they regard tenure not as a contractual right but as a status granted through legislative policy and thus subject to change. The contract clause of the U.S. Constitution forbids states to impair contracts.[43] But the U.S. Supreme Court explained, more than 40 years ago, that "the presumption is that [a tenure] law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the Legislature shall ordain otherwise."[44]

Whether a particular state's tenure statute gives teachers a vested contract right "will depend largely upon the wording of the particular teachers' tenure statute in question as evincing a legislative intention to create contractual rights."[45] In one early case, the U.S. Supreme Court ruled in 1938 that the wording of the Indiana teacher tenure law did give tenured teachers vested

contract rights that could not be retroactively taken away. The ruling appears limited to Indiana's particular statute in which "the word 'contract' was not used inadvertently or in other than its usual meaning."[46] Even in finding that Indiana's tenure statute did confer an indefinite contract, the Court pointed out the general rule that prevails in the absence of specific contractual language in the legislation: "the principal function of a legislative body is not to make contracts but to make laws which declare policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy."[47]

A legislature legally may abolish tenure.[48] Legislative action cannot change constitutional or contractual rights.[49] But it can change statutory rights, and tenure rights are statutorily based.[50] Even in the few states where tenure statutes seem to give contractual rights, as Indiana's statute did in 1938, a legislature may revise the statute prospectively -- waiting until contracts have expired, that is, and exempting employed teachers from revised requirements. Or a legislature may modify tenure by making it renewable, for instance, instead of abolishing it outright. It may opt to "grandfather in" already-tenured teachers (exempt them from stiffer requirements), but is probably not required to do so.

Of course, writing legislation to abolish tenure is easier than creating or strengthening an evaluation process. Even if tenure were abolished, the problem of how to evaluate teachers would remain.

## Changes in Certification

States can generally change recertification requirements for teachers as well as tenure requirements. In most states, teaching certificates must be renewed at various intervals, and some of the very few states that still issue lifetime licenses are considering periodic recertification.[51]

Most states appear to be moving toward requiring in service training for recertification. No state currently tests teachers for recertification, but Arkansas has just enacted a requirement that teachers be tested for recertification and other states, e.g., Florida, are considering similar requirements.[52] If a state does want to use testing for recertification, it must make sure that the test used has been validated for that purpose (and not merely for initial certification). For instance, Georgia's use of the National Teacher Examination (NTE) was held unconstitutional because the test was not validated for recertification. A federal court ruled that, without such validation, the test produced an arbitrary classification in violation of the equal protection clause.[53] Moreover, the Educational Testing Service, which designed the NTE, has long expressly stated that using the NTE to terminate teachers is

"inappropriate."[54] Just recently, the testing service publicly announced that it will not permit the use of the NTE as a test for recertification.[55] For all these reasons, the use of test scores to evaluate employed teachers is unlikely to be upheld in the courts,[56] although it is still possible that a state could develop a test that could be adequately validated.

Some school boards have introduced continuing education requirements for tenured teachers, sometimes tying these requirements to pay raises, and many states require continuing education for certificate renewal. As a political matter, teachers have sometimes vigorously opposed such certification requirements. Some litigation has already occurred and more is likely.[57]

However, the Supreme Court has held that teacher continuing education requirements are rationally related to legitimate public objectives. The Court stated that "[t]he School District's concern with the educational qualifications of its teachers cannot under any reasoned analysis be described as impermissible . . . . The sanction of contract non-renewal is quite rationally related to the Board's objective of enforcing the continuing education obligation of its teachers."[58] The Supreme Court did not address the issue of how a continuing education requirement actually relates to improved job performance. The Court assumed that that type of requirement was closely enough related to the goal of better qualified teachers. Many experts have questioned whether continuing education requirements improve teacher performance,[59] but this is so far basically a policy objection rather than a legal concern. Continuing education requirements are much easier to justify in court than testing programs, for which the fairly complicated validation procedures discussed above must be completed.

It seems, then, that tenured teachers may be required to meet new requirements to retain their jobs as long as the qualifications are reasonable and have been introduced with sufficient advance notice. Any new recertification requirements should be phased in carefully. Legal problems would arise if at least a year's advance notice were not given, and a longer phase-in period might be necessary. For instance, several years would probably have to be provided if teachers were required to earn continuing education credits. Sufficient advance notice is necessary to protect the due process rights of teachers by giving them an opportunity to meet new requirements.

Other Changes

If a school board institutes special bonuses for new teachers, the board must make sure not to impair the contractual rights of current teachers, and the basis for awarding financial incentives must be rationally related to the public interest in improving

education. If special teachers are hired, questions about tenure and seniority will arise. States may choose to limit teachers' seniority rights to the subjects which they have actually taught[60], although this would discourage teachers from shifting to subjects, like mathematics and science, in which there are teacher shortages. In many of these instances both tenure laws and collective bargaining agreements must be considered.

## Collective Bargaining

Labor laws affect how reforms of teachers' working conditions can be implemented. Thirty-three states have authorized collective bargaining in public education, and other states are expected to authorize it by the end of this century.[61] A cluster of significant labor law issues should be considered in any move to improve the teaching force.

### Scope of Bargainable Issues

Most collective bargaining laws make wages, hours and "terms and conditions" of employment subject to the collective bargaining process.[62] If a state has collective bargaining, issues considered terms of employment must be agreed to in the negotiating process. On the other hand, most collective bargaining laws place "education policy" outside the scope of collective bargaining. This dichotomy has major significance for teacher reform: a measure categorized as a term of employment must survive the bargaining process, whereas a measure categorized as education policy can be implemented unilaterally.

Public-sector labor relations law varies widely from state to state and, unlike private-sector labor law, is not governed by federal law.[63] While some states define negotiable "terms and conditions" in fair detail, many do not. Some further specify which topics may be negotiated and which must be negotiated. Some provide for "meeting and discussing" only on policy issues that are nonbargainable. A number of states define management rights or prerogatives, although to varying extents.[64]

Many specific issues affecting teachers, however, have been difficult to characterize. Educational goals, the length of the school year, number of classroom hours and individual decisions on tenure have all been held to be nonbargainable issues. Grievance procedures, transfer, reassignments and reduction in force are typically mandatory subjects of bargaining. Class size may be subject to bargaining in some states[65] and most collective bargaining agreements over the past decade have specified criteria and procedures for evaluating teachers. But some observers have pointed out a continuing need for legislative clarification.[66]

Some of the remaining statutory uncertainty is unnecessarily costly, and it is a variable affecting teacher improvement that can be readily corrected.

The governance issue of permissible delegation of authority also affects collective bargaining and efforts to raise teacher quality. Elected school board officials may not give away or delegate their ultimate decision-making authority over terms and conditions of public school employment. Collective bargaining agreements would therefore be illegal if they conflicted with constitutional or statutory provisions concerning the duties of local school boards. Over the past 15 years, many courts have upheld collective bargaining in public education against challenges based on state constitutional prohibitions on delegation of legislative authority to persons other than elected officials.[67] When, for instance, binding arbitration of grievances between schools and teachers has been challenged as violating the state constitution, the courts usually uphold arbitration as long as the arbitrator is not given discretion over matters reserved to management, like education policy.

Union Duty of Fair Representation

Particularly significant to efforts to raise teacher quality is the fact that a union owes a legal duty of fair representation to every employee who is represented in the bargaining unit that the union represents. This duty plays a role in school efforts to get rid of incompetent teachers. State collective bargaining statutes do not spell out this duty, but the courts have concluded that the duty of fair representation is implicit, a quid pro quo for the legislative power conferred on the union to act as exclusive representative of all the employees covered.[68] A union must diligently represent and act to benefit the interests of all individuals in the bargaining unit, including those in the bargaining unit who are not union members.[69]

The union has a duty to evaluate grievances in good faith and make decisions about their merits. When a union does pursue a grievance, "it must not do so in a perfunctory manner."[70] (A union would violate its legal responsibility by, for instance, discriminating against black teachers.) If a union breaches this duty, courts may hold the union liable to the individual employee. Unions may therefore feel they must vigorously represent the interests of a teacher who is disciplined for unsatisfactory performance, even if union members privately agree with school management that the teacher is not doing a good job. The union has no duty to pursue every grievance, no matter how frivolous. Only when a union's conduct is arbitrary, discriminatory or in bad faith does the union incur liability.

The existence of a collective bargaining agreement "does not prohibit the discipline and dismissal of poor teachers."[71] When

management sets forth specific, valid reasons for teacher discipline, the union has no obligation to pursue a grievance. Many school administrators may not realize this and may also not recognize the possibility that a union may not win in grievance proceedings. General misunderstanding about the duty of fair representation does appear, on occasion, to interfere with efforts at improving the caliber of the teacher force. Clarification of that duty might make efforts go more smoothly.

## Equity Considerations

Equity issues should always be considered in connection with reforms affecting employed teachers. All of the equity problems raised in connection with screening teachers also pertain to the continuing employment of teachers.

Promotion plans based on teacher test scores typically pose equity issues. In 1976, a South Carolina county school board gave pay raises to teachers who performed well on a test, thereby producing racially disparate results. The decision to tie teacher pay raises to scores on the NTE was upheld by a federal appellate court. In finding no violations of the Constitution or of Title VII of the Civil Rights Act, the Fourth Circuit ruled that the school's practice served its legitimate employment objectives, despite its racially disparate impact. Likewise, the court found the practice was not arbitrary and capricious. The court explained in 1981 that "[p]ay increases for the highest rated teachers enhances [sic] the School Board's capacity to attract highly rated teachers from the outside."[72] Thus, it appears to be legal to use teachers' scores on validated tests as a basis for pay raises, although it would not be legal to use those scores as a basis for firing teachers (unless somehow the scores could be shown to indicate ineffective classroom performance).

Retirement plans may also pose equity problems. States must make sure they do not discriminate against older teachers as they attempt to improve the teaching force. The federal Age Discrimination in Employment Act now prohibits age discrimination against personnel under 70 by state and local public employers.[73] A mandatory retirement age of under 70 is vulnerable under this law, unless the requirement is a bona fide occupational qualification or can be shown to relate to job performance.[74]

Although state tenure statutes treat retirement variously, states that set a mandatory retirement age under 70 should be prepared to show that age relates to effective teaching. Mandatory retirement provisions may also be attacked under state civil rights statutes prohibiting age discrimination. One such state civil rights law, for instance, was deemed to imply the repeal of the requirement for mandatory retirement at 65 contained in the state teacher tenure statute.[75] On the other hand, if challenges to mandatory

teacher retirement policies are based only on the Constitution and not on statutes, the policies will usually be valid. The courts have generally ruled that teacher retirement systems are rationally related to legitimate state objectives and have rejected equal protection and due process challenges.[76] The Hawaii Supreme Court, for instance, recently upheld the constitutionality of the Hawaii tenure law, which requires mandatory retirement at age 65. The court considered the requirement rationally related to "state interests in maintaining student discipline and preserving the quality of instruction through the retirement of school teachers whose physical and mental skills generally decline with age."[77]

## The Interrelationship of Tenure and Labor Laws

Tenure laws and collective bargaining laws both developed as means of protecting teachers' rights from arbitrary administrative action. Some people have suggested that tenure laws may become unnecessary as collective bargaining becomes the norm and as courts develop extensive constitutional law provisions for public employees. Collective bargaining agreements probably will incorporate most procedural protections provided by tenure laws, but they are, of course, always subject to renegotiation; tenure laws offer more permanent protection since they are statutes.

Unfortunately, all too often lawmakers have insufficiently considered how these areas of law relate. The result has been inconsistencies and ambiguities, especially since laws in each area were often enacted piecemeal. Legal uncertainties stemming from undefined boundaries can hinder reform, so states need to look at the overall teacher employment system created by existing state law, considering labor law and tenure components together.

For instance, the authorized scope of bargaining and the enumeration of management rights in state labor laws may need to be revised to reflect the role of teachers in selecting master teachers. Statutory responsibilities of school boards may also need to be revised. Another example of overlap: certain rights, such as the right to tenure and to procedural protections in the discharge process, are guaranteed by statute -- yet collective bargaining may result in some of those same rights being given up. Does public policy permit waiver of these statutory rights by contract? Courts may permit some procedural protections to be waived in a labor agreement, but they generally will not permit waiver of tenure rights. Tenure decisions are matters of education policy and therefore not bargainable. Legislative limitations on the collective bargaining process may affect the possibilities for reform. For instance, although the consensus is that teacher salaries are too low to attract or retain talented teachers,[78] legislation in some states limits the salary increases that can be given in collective bargaining.

Thus, tenure reform poses more statutory and political problems than constitutional ones, with the important exception of potential inequities in evaluation and promotion systems. Of course, the procedure by which a reform is implemented could raise constitutional problems if phase-in periods are insufficient. In general, though, the key to the legality of proposals for career ladders, merit pay and other reforms is thorough consideration and integration of all pertinent state statutory law.

To avoid inconsistencies, statutes may need revision. For instance, implementing some form of career ladder would require changes in most tenure laws. Teachers would have different licenses or certificates at each level of the ladder. Statutory time periods for achieving tenure would have to be changed. Some mechanism should be provided for recognizing seniority rights. Collective bargaining agreements would need to be revised to recognize new seniority structures authorized by the legislature.

## 3. DISMISSAL

> [T]he dismissal of teachers and non-renewal of their teaching contracts is sometimes a complex, difficult process, with serious implications. Because of the fact that under the statutory procedures, the dismissal or non-renewal of a teacher requires a long and time-consuming effort, school administrators and Boards of Education are often reluctant to institute such procedures against teachers who ought to be dismissed. As a result, the students suffer from the quality of their education. On the other hand, teachers, at times in the past, have not been fairly treated and have been dismissed or non-renewed without good reason. In determining cases involving the dismissal or non-renewal of a teacher's contract, the courts are obligated to consider the rights of the teacher, the rights of the School Board, and the rights of the school children to receive a quality education in a proper school atmosphere.[79]

Although teacher discharge is undoubtedly a complicated process, it presents some discrete legal problems. This section analyzes issues of incompetence, academic freedom, reduction in force and procedural requirements. Contrary to popular assumptions, neither constitutional principles of academic freedom nor tenure provisions concerning incompetence need interfere with school efforts to improve the teaching force.

### Incompetence

The assumption that tenure laws force public schools to put up with incompetent teachers seems widespread. While it is surely true that some teachers are incompetent, tenure laws do not require that result. State tenure laws do not generally pose a legal obstacle to dismissing incompetent teachers, although they may lead to some delay. All tenure laws authorize dismissal for cause, and most specify the conduct that constitutes cause; they do not require schools to continue the employment of incompetent teachers. Tenure laws do make the dismissal process somewhat complex. Most laws specify a procedure for dismissing a tenured teacher, which schools must follow and document.[80] The statutory requirements for dismissal are designed to protect due process rights based on the Constitution, so they must be met exactly.

All too often administrators seem reluctant to initiate dismissal procedures and instead put up with unsatisfactory teachers or transfer them to other schools, while placing the blame on the tenure system. Yet, as long as teachers' procedural rights are respected, courts are unlikely to deny attempts to fire truly

incompetent teachers. As discussed earlier, the judiciary is most unwilling to second-guess educators on academic decisions related to the competence of a teacher. "A teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests. These determinations are 'in an area in which school officials must remain free to exercise their judgment'. . . Courts are not qualified to review and substitute their judgment for these subjective, discretionary judgments of professional experts . . . ."[81]

Tenure statutes typically define cause for dismissal broadly as including immorality, incompetence, insubordination, physical or mental incapacity, neglect of duty or other sufficient cause. The courts are limited to the statutory provisions: a dismissal will be legal only if it is justifiable on one of these grounds. The meaning of these statutory terms has been extensively disputed in litigation in every state. Most teacher dismissal litigation does not seem to involve classroom performance or competence, but rather morality or involvement in social or political controversies.

Some school administrators have suggested that these terms are too vague to be useful, and that administrators would be less reluctant to dismiss poor teachers if the statutes were made more specific. They argue that educators hesitate to invoke an abstract reason for dismissal like "incompetence," because they are uncertain about its legal meaning, and that elements such as lack of mastery of material or inability to impart knowledge to students should be specified in statutes.

Tenure statutes, like other types of laws, must be written clearly enough to give a person of ordinary intelligence notice of what kinds of conduct are forbidden. However, the courts have generally found that terms like "immorality," "incapacity" or "incompetence" are sufficiently precise to indicate what conduct is proscribed. These relatively broad terms also provide valuable flexibility in dealing with a wide range of unforeseeable circumstances.[82] If the broad terms were replaced with enumerations of specific types of misbehavior, there would probably not be a valid statutory basis for terminating the tenure of a teacher who behaved in some troublesome way not listed in a statute. Especially when some criteria for evaluation are enumerated in a tenure statute, "incompetence" seems to be a sufficiently specific basis for tenure termination. Procedural irregularities aside, schools have generally been successful in dismissing teachers on the basis of incompetence.[83]

Schools generally can refuse to rehire probationary teachers for any reason, which is not the case with tenured teachers. However, when a probationary teacher has a contract, he or she may be

discharged before the term of that contract only for valid cause and schools must preserve the constitutional rights that teachers have as individuals, such as the right to free speech.

Teachers can be dismissed if they do not meet new requirements for competence, as long as a school board has implemented those requirements properly. Competence is broadly defined and tenure rights are generally subject to legislative modification. Consequently, when a legislature enacts tougher standards for competence, teachers must meet those standards or be subject to termination. Of course, adequate procedural safeguards must be observed.

## Reductions in Force

Layoffs present particularly difficult equity issues. Because they have the lowest seniority rights under collective bargaining agreements, and because tenure statutes generally also base layoffs on seniority, the teachers last hired would be first fired. However, courts will not enforce collective bargaining provisions that are contrary to public policy, and layoffs based strictly on seniority may have the effect of reinstituting prior discrimination. Title VII of the Civil Rights Act of 1964 authorizes courts to disturb seniority rules, even when part of a collective bargaining agreement, to "make whole" employees who have been discriminated against. Some tenure statutes contain specific provisions for dismissals based on reduction in force for financial reasons. Nevertheless, where a school has previously engaged in intentional discrimination, neither collective bargaining provisions nor state tenure laws will be allowed to impede the correction of unconstitutional discrimination.[84]

The circumstances in which seniority rights give way to equity mandates depend on whether discrimination was found under the Constitution or simply under Title VII. Title VII protects bona fide, neutral seniority systems as long as no intentional discrimination is proved. Under Title VII it is not unlawful to base different terms of employment on a seniority system.[85]

School boards must be sensitive to these equity considerations in deciding to reduce the size of the teaching force. They also may not dismiss a teacher because he or she exercises freedom of speech. Further, the unions' duty of fair representation obligates them diligently to pursue grievances on behalf of teachers who are unfairly or improperly discharged.

If these and other legal issues are not considered, a teacher's dismissal may be illegal. But if school administrators understand the legal issues, they may be less reluctant to initiate the process of dismissing an incompetent tenured teacher. Clarification of expectations and conditions for teachers and administrators alike should help avoid some problems. Even

if teacher dismissal can never be wholly litigation-free, the policy-maker's goal should be to minimize needless litigation.

## Legal Limits to Academic Freedom

Any move to hold teachers more accountable for their performance must not fail to consider teachers' individual rights to freedom of speech and academic freedom. It would be unconstitutional, for instance, to dismiss a teacher who spoke out in public against a merit pay plan. Likewise, it would violate the first amendment to base promotion or transfer decisions on a teacher's private complaints to a school principal about racial inequities in the school.[86]

The U.S. Supreme Court has held that teachers retain the first amendment rights they hold as citizens, but that a teacher's freedom of expression is not absolute. When teachers express their views outside of the classroom, they have the same rights as others. They are free to speak out on public issues.[87] Inside the classroom, teachers must meet job expectations, which implies reasonable restrictions on the expression of private views.

The first amendment does not protect teachers who fail to teach assigned subjects, or who insist on teaching additional subjects that school officials have found inappropriate for a particular class. Teaching methodology is entitled to some protection, but a teacher may not present a personal view as part of a course. The Supreme Court has acknowledged some sort of undefined right of teachers to teach, but it has not dealt directly with the issue of academic freedom in the classroom.[88]

Although assertions that "academic freedom" has been violated are popular in teacher disputes, schools are perfectly free to discharge unsatisfactory teachers as long as the discharge is based on factors other than the exercise of first amendment rights. The first amendment will not insulate an otherwise unfavorable performance record.[89] Particularly when a teacher has been asked to stop including extraneous material in class, a claim of academic freedom will be treated as a "red herring." For example, courts have upheld the dismissal of teachers who have persisted in using religious material in class.[90] Likewise, a school legally dismissed a teacher who knowingly showed a pornographic film to his students.[91]

The first amendment also does not protect employees who are insubordinate. If a teacher speaks out on issues not of public concern, such as internal office policies, and that action destroys close working relationships, the first amendment would not protect him or her from being dismissed. Although whether a

particular issue is of public concern is not always clear, personnel matters and internal operations will generally not be considered of public concern.[92]

## Procedural Requirements

Tenure laws generally provide that the contract of a tenured teacher (or, as some statutes may describe it, a "permanent" teacher) is automatically renewed from year to year unless the school board notifies the teacher otherwise by a certain date in the spring. The contract of a nontenured teacher generally may be not renewed for any reason or no reason, as long as non renewal is not based on constitutionally impermissible criteria and certain procedural formalities are observed. The procedural steps required vary with state law and judicial interpretation. Generally, nontenured teachers do not have a right to a hearing before they are dismissed.

Can a nontenured teacher acquire tenure if a school neglects to notify the teacher properly of nonrenewal? In some states, teachers have acquired tenure in these circumstances. In other states, though, courts have ordered reemployment of nontenured teachers on an annual basis, holding that tenure should not be acquired automatically because of procedural irregularities. For instance, an Illinois court observed that improper dismissals did not entitle teachers to tenure, because schools must have the "opportunity . . . to observe and evaluate the actual performance of a teacher's work for two years." In ordering the reemployment of a teacher for another probationary year, the court noted that this would provide "adequate opportunity to observe and evaluate plaintiff's teaching job for the required two (consecutive) school terms at the end of which she may be rehired with the result of her acquiring tenure or be dismissed as a probationary teacher if the school board complies with all the statutory procedures."[93]

Where a tenure statute requires local adoption of specific criteria for teacher evaluation, dismissal generally will be illegal if a school board has neglected to draw up criteria and then attempts to dismiss a tenured teacher. Likewise, when a statute requires a school to develop a written improvement program for "remediable teaching deficiencies" of an unsatisfactory teacher before dismissal, dismissal will be illegal if that program has not been developed.[94] In Washington, for instance, "Lack of necessary improvement shall be specifically documented in writing with notification to the probationer and shall constitute grounds for a finding of probable cause (for discharge)..."[95] In Pennsylvania, teachers must be "rated by an approved rating system which shall give due consideration to personality, preparation, technique, and pupil reaction, in accordance with standards and regulations for such scoring as defined . . . by the Department of Public Instruction . . ." before they are dismissed

for incompetence.[96] Courts require technical compliance with the steps of tenure termination, to assure that teachers are not dismissed for arbitrary reasons.

Dismissal also requires consideration of constitutional mandates. Although there is no federal constitutional right to public employment, equity issues arise, of the sort discussed earlier in this paper: a teacher may not be dismissed on the basis of race or sex. A teacher may not be discharged for exercising first amendment rights, as discussed above, and procedures must be fair, to protect teachers' due process rights. Constitutionally based procedural protections and equity rights are relatively recent judicial developments that have appeared long after tenure teacher laws. But they assure that, even if tenure were abolished, teachers would still enjoy fundamental job protections.

The fourteenth amendment guarantees procedural due process when state action jeopardizes the liberty or property interests of an individual. Procedural due process generally mandates the right to a fair hearing before an individual is deprived of a property right, although a hearing after deprivation may suffice in some circumstances. Although procedural due process has not been precisely defined, adequate notice, a fair hearing before an impartial decision maker and the opportunity to present evidence are standard components. The exact protection required will depend on the particular interest jeopardized. Tenured teachers are entitled to procedural due process; nontenured teachers generally are not when they have no legal expectation of continued employment. In some circumstances, however, even probationary teachers are entitled to procedural due process before they are dismissed. A clearly implied contract, short of actual tenure, would constitute a property interest. Or, if a school decides to dismiss a teacher for reasons that would stigmatize the teacher's professional reputation, the teacher's constitutionally protected "liberty" interest is jeopardized and procedural due process applies. As the Supreme Court has explained, "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[97]

Whether or not a teacher's interest in continued employment constitutes a protected property interest depends on applicable state law. The Supreme Court referred in Roth to "existing rules or understandings," short of a formal tenure system, as sufficient to constitute a protected property interest.[98] Recently, a federal appellate court ruled that a nontenured school athletic director and coach in Illinois did have a protected property interest, which a school unconstitutionally impaired by refusing to rehire him for a second year. The Supreme Court has recently agreed to consider the case and perhaps may clarify what protections are afforded nontenured school employees and whether teachers are entitled to greater protection from arbitrary dismissal than other school employees.[99]

## 4. CONCLUSION

Legal considerations need not impede teacher quality. But multiple areas of law should be considered as states develop teacher reform strategies. The two most important potential sources of problems for states are equity and due process rights. These two constitutional mandates, the one prohibiting discrimination and the other requiring fairness of procedures, affect teachers' entry into the profession, their employment and their dismissal.

In many cases, supposed legal problems are more perceived than real. Contrary to public assumption, it is not impossible to dismiss incompetent tenured teachers, and courts will uphold validated and properly implemented testing of teachers for state certification.

As states strive to hold teachers more accountable, they must simultaneously preserve teachers' individual constitutional rights. Most aspects of the teaching system that have been established by statute are subject to legislative revision. Ultimately, though, legislation cannot solve every problem: legislatures can only shape the context in which teachers teach, leaving to the teachers themselves the fundamental task of educating children.

## APPENDIX
## STATE REQUIREMENTS FOR TESTING FOR TEACHER CERTIFICATION

Alabama (State Board authority).

Arizona Rev. Stat. Ann. sec. 15-533 (Supp. 1982).

Arkansas Stat. Ann. sec. 80-1201 (Supp. 1983).

California Educ. Code sec. 44252 (West Supp. 1983).

Colorado Rev. Stat. secs. 22-60-103 (9-5), 22-60-113(2) (Supp. 1982).

Connecticut (State Board authority).

Delaware (State Board authority).

Florida Stat. Ann. sec. 231.17 (West Supp. 1983).

Georgia (State Board authority).

Louisiana Rev. Stat. Ann. sec. 17:7 (West 1982).

Mississippi Code Ann. sec. 37-9-11 (1972).

New Mexico (State Board authority).

New York (State Board authority).

North Carolina (State Board authority).

Oklahoma Stat. Ann. tit. 70, sec. 6-156 (West Supp. 1982).

South Carolina Code sec. 59-26-20 (Supp. 1981).

Tennessee (State Board authority).

Texas Educ. Code Ann. tit. 2, sec. 13.032(e) (Vernon Supp. 1982).

Virginia Code sec. 22.1-298 (1980).

West Virginia (State Board authority).

NOTES

1. This paper will analyze the types of legal issues that should be considered under these programs, rather than examining the plans in detail. See Flakus-Mosqueda, Survey of States' Teacher Policies (Education Commission of the States, 1983).

2. See Flakus-Mosqueda, Survey of States' Teacher Policies, 32-39 (Table III) (Education Commission of the States, 1983). This paper discusses only public school teachers, although some states require that teachers be certified to teach in private schools as well. Some of these requirements have been challenged. For an examination of the legal issues affecting a state's authority to regulate private schools, see Lines, "Private Education Alternatives and State Regulation," 12 J. Law & Ed. 189 (1983).

3. For detailed compilations of which states set which specific certification requirements, see Flakus-Mosqueda, Survey of States' Teacher Policies (Education Commission of the States, 1983).

4. New York Times, Aug. 18, 1983, at 34.

5. Starting in July 1984, Missouri will require students who wish to enroll in teacher training programs to achieve certain minimum scores on standardized aptitude tests (such as the College Boards's Scholastic Aptitude Test). Education Daily, Aug. 11, 1983, at 2.

6. Citron, The Rights of Handicapped Students, at 9-10 (Education Commission of the States, 1982).

7. For further discussion of this issue, see Lines, "The Legal Powers of State Boards of Education" in Footnotes no. 15 (Education Commission of the States, Summer 1983). In Kansas, the attorney general recently ruled that the state board, rather than the legislature, has final authority over accreditation of schools and teacher certification. Education Week, Oct. 26, 1983, at 3. This is not the case in most states.

8. Cal. Educ. Code sec. 44210 (West Supp. 1983).

9. Fla. Stat. Ann. sec. 240.529(2) (West Supp. 1983). Alabama has adopted a similar requirement, by state board resolution, and Georgia is considering such a requirement. Education Week, Nov. 9, 1983, at 6.

10. Education Daily, July 27, 1983 at 5.

11. Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 92 (1978).

12. United States v. South Carolina, 445 F. Supp. 1094, 1107 (D.S.C. 1977), aff'd mem., 434 U.S. 1026 (1978).

13. Washington v. Davis, 426 U.S. 229, 245-46 (1976).

14. For an overview of legal issues in student competency testing, see Citron, Issuegram no. 36,"Legal Rules for Student Competency Testing" (Education Commission of the States, 1983).

15. E.g., Debra P. v. Turlington, 564 F. Supp. 177, 185 (M.D. Fla. 1983), appeal pending; Anderson v. Banks, 540 F. Supp. 761, 763-764 (S.D. Ga. 1982); see also Mahavongsanan v. Hall, 529 F.2d 448, 450 (5th Cir. 1976) (recognizing that a graduate student in education was given additional makeup work after failing comprehensive examination).

16. First, tests should have face validity. They should also have content validity: that is, the material tested and the abilities actually needed on a job should match. Sometimes tests are required to have a more abstract kind of "construct" validity, which refers to how well the test measures the construct or theory for which it was designed. The more a test looks like a test of pure intelligence, the more important it is to establish construct validity as well as content validity. If a test purports to measure "aptitude" for teaching, a construct validation study must show that "aptitude" is closely related to teaching skills, not merely an aspect of general intelligence. See, generally, Madaus, George F., The Courts, Validity and Minimum Competency Testing (Boston: Kluwer-Nijhoff Publishing, 1983).

17. See Debra P. v. Turlington, 644 F.2d 397, 403-407 (5th Cir. 1981), rehearing denied, 654 F.2d 1079 (5th Cir. 1981), on remand, 564 F. Supp. 177 (M.D. Fla. 1983), app. pending (a student competency testing case).

18. Washington v. Davis, 426 U.S. 229 (1976).

19. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Various other federal anti-discimination laws also overlap somewhat with Title VII. Title VI of the Civil Rights Act of 1964 also prohibits discrimination in federally funded activities or programs, although the rules on when intent is required and for what kinds of relief, are complex. See Guardians Ass'n v. Civil Service Comm'n, 103 S. Ct. 3221 (1983). The Supreme Court is divided on these points.

20. Guardians Ass'n of New York City v. Civil Service, 630 F.2d 79, 88 (2d Cir. 1980).

21. United States v. North Carolina, 400 F. Supp. 343, 349 (E.D.N.C. 1975), vacated on other grounds, 425 F. Supp. 789 (E.D.N.C. 1977). The first decision was issued before the U.S. Supreme Court's decision in Washington v. Davis, 426 U.S. 229 (1976), requiring proof of a discriminatory purpose in order to find a constitutional violation. Recently, the federal district court approved a final settlement of the case, whereby the state will provide a remedial plan to help would-be teachers who fail the test. Education Daily, July 20, 1983, at 2.

22. United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), aff'd mem., 434 U.S. 1026 (1978). The court rejected the claim of no relationship between the test and "the actual job of teaching" as "irrelevant," because all expert witnesses in the case had agreed "that there is, as yet, no satisfactory measure of teaching effectiveness." 445 F. Supp. at 1108, n. 13.

23. United States v. South Carolina, 434 U.S. 1026, 1028 (1978) (J. White, dissenting).

24. See, e.g., Ensley Branch of N.A.A.C.P. v. Seibels, 616 F.2d 812, 819-820 (5th Cir. 1980), cert. denied, 449 U.S. 1061 (1980); see also, United States v. Virginia, 620 F.2d 1018, 1024 (4th Cir. 1980).

25. These criteria were developed by the federal appeals court in Guardians Ass'n of New York City v. Civil Service, 630 F.2d 79, 95 (2d Cir. 1980).

26. Guardians Ass'n of New York City v. Civil Service, 630 F.2d 79, 96 (2d Cir. 1980). [A related case of the same name but raising other issues was reviewed by the U.S. Supreme Court: Guardians Ass'n of New York City v. Civil Service, 630 F.2d 232, 243 n. 19 (2d Cir. 1980), aff'd, 103 S. Ct. 3221 (1983).]

27. Also, testing programs seem likely to suffer if teachers are not involved. For instance, earlier this year, when Houston instituted a teacher competency test, teachers were unhappy about a variety of issues concerning the test. Widespread and flagrant cheating by many teachers was reported. Education Daily, March 11, 1983 at 5.

28. For an extensive discussion of the meaning of this statute in the context of education, see Citron, The Rights of Handicapped Students (Education Commission of the States, 1982).

29. Ark. Stat. Ann. sec. 80-1266.2 (Supp. 1983). See, also Miss. Code Ann. secs. 37-9-25, 37-9-59 (1972 & Supp. 1983).

30. E.g., Fla. Stat. Ann. sec. 231-29 (West Supp. 1983); Kan. Stat. Ann. secs. 72-9003, 72-9004 (Supp. 1982); Wash. Rev. Code Ann. sec. 28A.67.065 (1982). See also N.J. Stat. Ann. sec. 18A:6-75 (West Supp. 1983) establishing a performance evaluation project and developing "criteria for professional teaching competence based on performance evaluation prior to the issuance of initial teaching certificates."

31. Florida, Kansas or Washington laws cited previously could be used as model legislation.

32. See, e.g. Thomas Toch, "Merit-Pay Issue Dominates School-Reform Debate," Education Week, June 15, 1983, 1, 14.

33. Ann Weinheimer, "Master-Teacher Plan Will Need Master Planning," Education Week, May 25, 1983, at 18.

34. See, e.g., Michael Cohen, "Effective Schools: What the Research Says," Today's Education, April/May 1981.

35. Wash. Rev. Code Ann. sec. 28A.67.065(1) (1982).

36. Don Cameron, executive director of the National Education Association (NEA) has stated that NEA is not opposed in principle to a merit pay plan: "The only caveat is that the teachers be involved in the planning of such a proposal." Education Week, June 8, 1983, at 6.

37. Robinson, "Paying Teachers for Performance and Productivity" Learning from Experience." (Virginia: Education Research Service, 1983).

38. See, e.g., Mayher, "Judging Teachers by Students' Achievement", Education Week, April 20, 1983, at 18. For example, the Virginia Congress of Parents and Teachers has recently advocated that teachers be evaluated on the basis of student performance. Education Week, Oct. 5, 1983, at 3.

39. Scheelhaase v. Woodbury Central Community Sch. Dist., 488 F.2d 237 (8th Cir. 1973), cert. denied, 417 U.S. 969 (1974).

40. One teachers' union leader recently expressed concern about a Chicago suburb's proposal to tie merit pay for school administrators to students' scores on standardized tests: "We have to take everyone who comes to us and do the best we can." New York Times, Sept. 18, 1983 at 66. In fact, many teachers believe that any merit pay plan will inevitably be based on student performance: "On paper, merit pay is an excellent idea. But teachers, unlike other workers, don't have control

over the raw material -- the students. How can you judge a teacher's effectiveness when it may not be within his power to influence the student's attendance, his relations with his family and other factors affecting achievement?" New York Times, July 2, 1983, at 5.

41. But, see Wis. Stat. Ann. sec. 118.30(4m) (West Supp. 1983), which appears to allow limited use of student test scores for evaluation of teachers and programs.

42. See Mahavongsanan v. Hall, 529 F.2d 448, 450 (5th Cir. 1976), where the Fifth Circuit rejected the claim of a graduate student in education that the education school had breached her matriculation contract by changing graduation requirements. The court characterized her "claim of a binding, absolute unchangeable contract [as] particularly anomalous in the context of training professional teachers in post graduate level work."

43. U. S. Const. art. I, sec. 10, cl. 1.

44. Dodge v. Board of Education, 302 U.S. 74, 79 (1937).

45. "Annotation, constitutionality and construction of repeal or modification by legislative action of teachers' tenure statute, as regards retrospective operation," 147 A.L.R. 193 (1943).

46. Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 105 (1938).

47. Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938).

48. Currently, proposals to abolish tenure are pending in at least two states, Colorado and Nebraska. Rocky Mountain News, Nov. 11, 1983, at 1.

49. E.g., Bowman v. Maine State Employees Apeals Board, 408 A.2d 688 (Maine 1979). The court held that legislation that terminated the classified position of a doctor who was employed by the state as hospital superintendent did not violate the contract clause of the U.S. Constitution because prior legislation gave the doctor no vested contractual right to that position.

50. "Annotation, constitutionality and construction of repeal or modification by legislative action of teachers' tenure statute, as regards retrospective operation," 147 A.L.R. 293 (1943).

51. E.g., Indiana. See Education Week, Sept. 7, 1983, at 22. See generally, Flakus-Mosqueda, Survey of States' Teacher Policies, Table V, at 46-52 (Education Commission of the States, 1983).

52. The Arkansas requirement of testing for recertification was enacted in November 1983 (H.B. 47) and has provoked widespread opposition from Arkansas teachers. New York Times, Jan. 17, 1984, at A16. See, also, Education Week, Oct. 5, 1983, at 6 (re the Florida proposal).

53. Georgia Ass'n of Educators v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976).

54. Walston v. County School Board of Nansemond County, 492 F.2d 919, 927 (4th Cir. 1974); Bryant v. Marion County School Dist., No. CA-82-1975-15, slip op. at 7 (D.S.C. Sept. 28, 1983).

55. ETS objects to the use of the NTE for recertification for legal reasons (no validation for that purpose) and educational ones (wrong to terminate a satisfactory teacher because of a test). New York Times, Nov. 29, 1983, at C1.

56. York v. Mobile County Board of School Commissioners, No. 83-T-421-N (M.D. Ala. Aug. 10, 1983).

57. In early 1983, Delaware withdrew proposed continuing education requirements after the state teachers' association filed a challenge to the requirements as beyond the authority of the state board of education and a violation of due process. See Education Daily, Jan. 25, 1983 at 3-4.

58. Harrah Independent School Dist. v. Martin, 440 U.S. 194 199-201 (1979).

59. See generally, Gideonse, "The Necessary Revolution in Teacher Education," Phi Delta Kappan 15 (Sept. 1982).

60. E.g., New Jersey currently is considering such a proposal. Education Week, March 16, 1983, at 8.

61. See Ross, Doris, State Education Collective Bargaining Laws, Report no. F-80-5. (Education Commission of the States, 1980).

62. This definition of the scope of bargaining is modelled on the definition in the National Labor Relations Act. 29 U.S.C. sec. 158(d) (Supp. 1982).

63. The National Labor Relations Act, which governs private labor disputes, does not apply to public employers. The term "employer" is defined in the federal law to exclude "any state

or political subdivision thereof." 29 U.S.C. sec. 152(2) (Supp. 1982).

64. For a thoughtful discussion of the scope of bargainable issues in the public sector, see Edwards, "The Emerging Duty to Bargain in the Public Sector," 71 Mich. L. Rev. 885, 919-921 (1973).

65. See Edwards, "The Emerging Duty to Bargain in the Public Sector," 71 Mich. L. Rev. 885, 919-921 (1973) (discussing how labor boards in different states reached opposite conclusions on whether class size was a mandatory subject of bargaining).

66. Bierman, "The Scope of Collective Bargaining in Public Education," 9 Educ. L. Rep. 823, 826 (1983).

67. See, e.g. Littleton Education Ass'n v. Arapahoe County School District, 191 Colo. 411, 553 P.2d 793 (1976) (collective bargaining between a school board and public school teachers does not violate the Colorado Constitution).

68. State courts derived the state duty of fair representation from the reasoning developed in federal labor law litigation. See, e.g., Belen v. Woodbridge Township Board of Education, 142 N.J. Super. 486, 362 A.2d 47 (N.J. Super. 1976), certific. denied, 72 N.J. 458, 371 A.2d 63 (1976); Jackson v. Regional Transit Service, 54 A.D. 2d 305, 388 N.Y.S. 2d 444, 443-444 (1976).

69. Belanger v. Matteson, 115 R.I. 332, 346 A.2d 124, 129 (1975), cert. denied, 424 U.S. 968 (1976).

70. Belanger v. Matteson, 115 R.I. 332, 346 A.2d 124, 131 (1975), cert. denied, 424 U.S. 968 (1976).

71. Johnson, Susan Moore, Teacher Unions and the Schools, at 178. (Harvard University, 1982).

72. Newman v. Crews, 651 F.2d 222, 225 (4th Cir. 1981).

73. 29 U.S.C. sec. 621 et. seq. (1975 & Supp. 1983). The Supreme Court recently upheld the constitutionality of the extension of this law to state and local governments. E.E.O.C. v. Wyoming, 103 S. Ct. 1054 (1983). Several lower courts have specifically ruled that the federal law applies to tenured public school teachers. Usery v. Board of Education of Salt Lake City, 421 F. Supp. 718 (C.D. Utah 1976); Kenny v. Board of Trustees of Valley County School Dist., 543 F. Supp. 1194 (D. Mont. 1982), motion for partial sum. j. denied, 563 F. Supp. 95 (D. Mont. 1983).

74. Congress considered providing an exemption for tenured public school teachers, but such an exemption was not enacted.

Mandatory retirement provisions for tenured college and university professors were exempted from the Act temporarily, but that provision was repealed in 1982. See Levine v. Fairleigh Dickinson University, 646 F.2d 825, 830-31 (3rd Cir. 1981).

75. Dolan v. School Dist. No. 10, 636 P.2d 825, 830 (Mont. 1981).

76. Palmer v. Ticcione, 576 F.2d 459 (2d Cir. 1978), cert. denied, 440 U.S. 945 (1979); but see, Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977), cert. denied, 440 U.S. 945 (1979) (rational basis test governs, but evidence must be submitted showing the state purpose served by the retirement policy).

77. Nagle v. Board of Education, 629 P.2d 109, 114 (Hawaii 1981). The federal age discrimination statute was not addressed in the case.

78. E.g., a bipartisan Congressional study group, the Task Force on Teacher Merit Pay, recently recommended that all teachers' salaries should be raised. New York Times, Oct. 12, 1983, at A14.

79. Childers v. Independent School District, 645 P.2d 992, 994 (Okla. 1982).

80. See generally, "Comment, Academic Tenure: The Search for Standards," 39 S. Cal. L. Rev. 593 (1966).

81. Clark v. Whiting, 607 F.2d 634, 639-40 (4th Cir. 1979) (footnotes omitted).

82. As the Colorado Supreme Court observed, "considerable discretion is left in the board of education to define the limits of such broad general terms as 'incompetency,' and 'immorality' in the education context . . . . It would be folly to suggest that [such a term] is a standard so clear as to leave no leeway in determining whether the facts of a particular case meet that standard." Blair v. Lovett, 582 P.2d 668, 672 (Colo. 1978).

83. See Johnson, Susan Moore, Teacher Unions and the Schools at 192 (Harvard University, 1982). Rosenberger, David and Richard Plimpton, "Teacher Incompetence and the Courts," 4 J. Law & Ed. 469 (1975); "Annotation, What Constitutes 'Incompetency' or 'Inefficiency' as a Ground for Dismissal or Demotion of Public School Teacher," 4. A.L.R. 3d 1090 (1965).

84. For a recent and thoughtful discussion of these problems see Arthur v. Nyquist, 712 F.2d 816 (2d Cir. 1983). See also Morgan v. O'Bryant, 671 F.2d 23 (1st Cir.), cert. denied, 103 S. Ct. 62 (1982).

85. The U.S. Supreme Court has not yet ruled on whether, and to what extent, Title VII permits courts to impair a state seniority statute in a reduction-in-force situation. Boston Chapter, N.A.A.C.P. v. Beecher, 679 F.2d 965, 973-935 (1st Cir. 1982), cert. dismissed as moot, 103 S. Ct. 2076 (1983).

86. Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979). For a general discussion of teachers' academic freedom rights, see Issuegram no. 37, "Teachers' Rights to Free Speech and Academic Freedom" (Education Commission of the States, 1983).

87. Pickering v. Board of Educ., 391 U.S. 563 (1968).

88. Tinker v. Des Moines Ind. Community School Dist. 393 U.S. 503 (1969).

89. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977), on remand, 670 F.2d 59 (6th Cir. 1982).

90. E.g., Fink v. Board of Educ. of Warren County School Dist., 442 A.2d 837 (Pa. Commwlth. 1982).

91. In re Shurgin, 56 N.Y.2d 700, 451 N.Y.S.2d 722 (1982).

92. Connick v. Myers, 103 S. Ct. 1684 (1983) (a non teacher case).

93. Bessler v. Board of Chartered School Dist., 356 N.E. 2d 1253, 1257 (Ill. App. 1976).

94. Wojt v. Chimacum School Dist., 9 Wash. App. 857, 516 P.2d 1099 (1973). See, e.g., Kan. Stat. Ann. sec. 72-9004(f) (Supp. 1982).

95. Wash. Rev. Code Ann. sec. 28A.67.065 (1982).

96. Pa. Stat. Ann. tit. 14, sec. 11-1123 (Purdon Supp. 1983). The Supreme Court of Pennsylvania has ruled that these evaluation provisions must be "strictly followed." Appeal of Sullivan County Joint School Board, 410 Pa. 222, 189 A.2d 249, 252 (1963).

97. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

98. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

99. Vail v. Board of Education of Paris Union School Dist., 706 F.2d 1435 (7th Cir. 1983), cert. granted, 104 S. Ct. 66 (1983).

## SUGGESTED READING

"Annotation, constitutionality and construction of repeal or modification by legislative action of teachers' tenure statute, as regards retrospective operation," 147 A.L.R. 293 (1943).

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United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977) aff'd mem., 434 U.S. 1026 (1978).

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